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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1383

CHRISTIANSBURG GARMENT COMPANY

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

BRIEF OF THE PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF CASES AND AUTHORITIES	(ii-iii)
OPINION BELOW	1
JURISDICTION	1
STATUTE INVOLVED	2
QUESTION PRESENTED	2
STATEMENT OF THE CASE	2
ARGUMENT	3
I. The Plain Meaning of the Statute	3
II. The Legislative History	4
III. Exercising the Discretion	7
A. The Standard for Plaintiffs	7
B. The Standard for Defendants	8
1. The Bad Faith Standard	8
2. Some Other Standard	9
3. A Double Standard	10
4. The Same Standard	11
CONCLUSION	11

TABLE OF CASES AND AUTHORITIES

Page

Alyeska Pipeline Services Co. v. The Wilderness Society, et al., 421 U. S. 240 (1975) 7, 9

Equal Employment Opportunity Commission v. Christiansburg Garment Co., 376 F. Supp. 1067 (W. D. Va. 1974) 1, 2-3

Ernst & Ernst v. Hockfelder, 425 U. S. 185, (1976) 4

F. D. Rich Co. v. Industrial Lumber Co., 417 U. S. 116 (1974) 8

Lea v. Cone Mills Corp., 438 F. 2d 86 (4th Cir. 1971) 8

Newman v. Piggie Park Enterprises, 390 U. S. 400 (1968) 7-8, 8

Robinson v. Lorillard Corp., 444 F. 2d 791 (4th Cir. 1971) 8

United States v. Oregon, 366 U. S. 643 (1961) 4

Pub. L. 92-261, 86 Stat. 103 2

15 U.S.C. §15 3

28 U.S.C. §1254(1) 1

29 U.S.C. §216(b) 3

35 U.S.C. §285 3

42 U.S.C. §2000a-3(b) 4, 7

42 U.S.C. §2000e 2

42 U.S.C. §2000e-5(k) 2

Hearings before Subcommittee No. 5 of the Committee on the Judiciary, HR, 88th Cong. 1st Sess. Part I (1963) 5

Page

H.R. Judiciary Committee Report No. 914 88th Cong. 1st Sess. (1963) 5

110 Congressional Record, 12722 5

110 Congressional Record, 12724 6

110 Congressional Record, 14201 6

110 Congressional Record, 14213-4 6

110 Congressional Record, 14214 6

Vass *Title VII Legislative History*, 7 B.C. Ind. and Con. L. Rev. 431 (1966) 5

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OPINION BELOW

The opinion of the Court of Appeals is not yet officially reported but is unofficially reported at 14 FEP Cases 262. The opinion of the District Court appears *sub nom, Equal Employment Opportunity Commission v. Christiansburg Garment Company, Inc.* and is reported at 376 F. Supp. 1067 (W.D.Va.1974).

JURISDICTION

The judgment of the Court of Appeals was entered on January 12, 1977. Certiorari was granted on June 20 1977.

The jurisdiction of this Court is invoked under 28 U.S.C. §1245(1).

STATUTE INVOLVED

Section 706(k) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-5(k) provides:

> "In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person."

QUESTION PRESENTED

Should the standard applied by district courts in exercising their discretion in awarding attorney's fees to a prevailing defendant in a Title VII action under the Civil Rights Act of 1964, as amended, (42 U.S.C. §2000e) be the same as the standard for a prevailing plaintiff?

STATEMENT OF THE CASE

On January 24, 1974, the Commission filed suit against Christiansburg pursuant to Title VII of the Civil Rights Acts of 1964, as amended, 42 U.S.C. §2000, et seq. (Supp. 1972). Christiansburg thereafter filed a motion for summary judgment on the ground, *inter alia,* that the Commission was without authority to institute the suit because under Section 14 of the 1972 Amendments to Title VII, Pub. L. 92-261, 86 Stat. 103, the Commission's new authority to bring a civil action applied only "to charges pending with the Commission on the date of enactment of (1972 Amendments) and all charges thereafter." The District Court granted Christiansburg summary judgment on the basis that the charge in the case was not "pending with the Commission" on March 24, 1972 when the Act was amended. *Equal Employment Opportunity Commission v. Christiansburg Garment Company,*

Inc., 376 F. Supp. 1067 (W.D.Va.1974) (1-2A Petition for Cert.).

In July, 1975, Christiansburg filed its Petition for Attorney's Fees pursuant to Section 706(k) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-5(k) (A-3). The District Court denied Christiansburg's Petition stating *inter alia*:

> "Although petitioner prevailed . . . the Commission's action in bringing suit cannot be characterized as unreasonable or meritless . . . and the Court has no doubt this suit represented good faith effort by the Commission—." (1-A Petition for Cert.)

The Court of Appeals for the Fourth Circuit affirmed:

> "Under these circumstances it could not be said that the Commission acted in bad faith in bringing the law suit." (4-A Petition for Cert.)

ARGUMENT

I. The Plain Meaning of the Statute

The statutory provision in issue is set forth above. In quite simple language, it says a district court "in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs. . . ." This statute is different from others passed by Congress. For example, it does not restrict an award to the "person . . . injured" as does 15 U.S.C. §15 under the antitrust laws, or to an employee-plaintiff as does 29 U.S.C. §216(b) under the Fair Labor Standards Act. Yet, it is like 35 U.S.C. §285 on patent infringement which provides for awards to the "prevailing party".

The statute in issue does not set forth any standard to be followed by district courts in exercising their discretion in allowing attorney's fees. In that respect, it is like the two statutes cited above allowing attorney's fees under the anti-trust laws and under the Fair Labor Standards Act. It is unlike the above cited statute on patent infringement which provides that the Court "in exceptional cases" may award the prevailing party attorney's fees.

The simple statutory language means:

1. That either the prevailing plaintiff or the prevailing defendant may be awarded an attorney's fee under the statute which courts would otherwise lack authority to award;

2. That the outcome of the litigation determines which party may be entitled to an allowance of attorney's fees; and

3. That district courts should be party-blind in exercising their discretion.

We submit that the statutory language is clear and unequivocal on its face. A prevailing defendant is entitled to an award of attorney's fees on the same basis as a prevailing plaintiff. The language of the statute does not countenance any other construction. In such cases, resort to the legislative history is unnecessary. *Ernst & Ernst v. Hockfelder*, 425 U.S. 185 at 200-1 (1976); *United States v. Oregon* 366 U.S. 643 at 648 (1961).

II. The Legislative History

Although resort to the legislative history of the statute is unnecessary to determine congressional intent, a review of the only relevant legislative history which deals with the Title II language of §202(b), 42 U.S.C. §2000a-3(b), confirms that the statute means what it says.

The pertinent legislative history begins with H.R. 7152, which was the administration's comprehensive bill on civil rights introduced by Representative Celler of New York on June 20, 1963. Section 204(b) of Title II of the bill, provided that "*the person aggrieved* . . . shall if he prevails be allowed a reasonable attorney's fee as part of the cost." (Emphasis added). Hearings before Subcommittee No. 5 of the Committee on the Judiciary, House of Representatives, 88th Cong., 1st Sess., Part I at 653 (1963).

In effect, a new bill was substituted by the Judiciary Committee for the original H.R. 7152. See Vass, *Title VII Legislative History*, 7 B.C. Ind. and Com. L. Rev. 431 at 435 (1966). Section 240(a) of Title II of this new bill substituted "*prevailing party*" for "*the person aggrieved*" and read as follows:

> "The Court in its discretion may allow the *prevailing party*, other than the United States, a reasonable attorney's fee as part of the cost." (Emphasis added)

There was no comparable provision under Title VII of the substitute although Title VII provided for civil actions by the Commission and by "the person aggrieved." H. R. Judiciary Committee, Report No. 914, 88th Cong. 1st Sess. (1963). The substitute version of H. R. 7152 was passed by the House of Representatives and sent to the Senate.

On June 4, 1964, H.R. 7152 came before the Senate for consideration. 110 Cong. Rec. 12722. Senator Humphrey in discussing proposed changes to Title VII of the bill, stated:

> "Twentieth. Section 706(1) provides for the award of attorney's fees to the *prevailing party*, other than the Commission and the United States. This should make it easier for a plaintiff of limited means to bring a meritorious suit. The provision for the taxing of costs against the Commis-

sion and the United States is similar to that in section 707(h) of the House bill." 110 Cong. Rec. 12724 (Emphasis added)

In subsequent debate on the bill, Senator Sam Ervin offered an amendment to strike out the Title II provision for awarding attorney's fees to the prevailing party. 110 Cong. Rec. 14201. In commenting on this provision and in replying to Senator Ervin's remark about "ambulance chasing", Senator Miller stated:

> "In response to the point of the Senator from North Carolina about the function or purpose of this provision in the bill, on page 10, possibly serving as a vehicle for ambulance chasing, I would appreciate his comments on this point that the ambulance chasing would be rather futile if the case were not meritorious and if the party lost because as the bill now provides, the attorney's fee is good only to the prevailing party." 110 Cong. Rec. 14213-14

Senator Pastore commented:

> "The purpose of this provision in the modified substitute is to discourage frivolous suits. Here the court would in its discretion be given power to order payment of attorney's fees to the prevailing party. First of all, it is within the discretion of the court. *It is not favoritism toward one party as against the other. When a person realizes that he takes a chance of having attorney's fees assessed against him if he does not prevail, he will deliberate before he brings suit.* He will make certain that he is not on frivolous ground." 110 Cong. Rec. 14214 (Emphasis added)

The Ervin Amendment was defeated in the Senate, 110 Cong. Rec. 14214, and thus the provision for awarding attorney's fees to the prevailing party remained in the bill — both in Title II and Title VII.

The bill as passed by the Senate was subsequently passed by the House of Representatives. The language in Section 202(b) of Title II of the Civil Rights Act of 1964, 42 U.S.C. §2000a-3(b) is practically the same as in Section 706(k) of Title VII, 42 U.S.C. §2000e-5(k)*

So spoke Congress.

As the dissent in the Fourth Circuit noted, "policy considerations are not matters for the Court, but are matters for Congress." In *Alyeska Pipeline Services Co. v. The Wilderness Society, et al.*, 421 U.S. 240 (1975), this Court in commenting on various statutes authorizing attorney's fees stated:

> "Under this scheme of things, it is apparent that the circumstances under which attorney's fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine."

Clearly, the Congress in 1964 determined as a matter of policy that prevailing defendants, as well as plaintiffs, should be awarded attorney's fees in the discretion of the Court. Congress could have determined that prevailing plaintiffs only should be awarded attorney's fees, but it did not. Congress could have established different standards for awarding fees to prevailing plaintiffs and defendants, but it did not.

III. Exercising the Discretion

A. *The Standard for Plaintiffs*

How a district court should exercise its discretion was considered in *Newman v. Piggie Park Enterprises*, 390 U.S.

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*The only differences in language are that Section 202(b) refers to "the United States", while §706(b) refers to "the Commission or the United States" and Section 202(b) begins "In any action commenced pursuant to this title", while 706(b) begins "In any action or proceeding under this title."

400 (1968). In that case this Court construed the language in Title II of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000a-3(b), and held that a prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." This rule has been followed in the awarding of attorney's fees to plaintiffs under Title VII. See, for example, *Robinson v. Lorillard Corp.*, 444 F.2d 791 (4th Cir. 1971); *Lea v. Cone Mills Corp.*, 438 F.2d 86 (4th Cir. 1971).

B. *The Standard for Defendants*

(1) The Bad Faith Standard

The Court below, as well as the district court, held that a different standard should apply in awarding attorney's fees to prevailing defendants. The standard adopted by the courts below in this case is the "bad faith" standard.

In *F. D. Rich Co. v. Industrial Lumber Co.*, 417 U.S. 116 (1974) at 129, this court stated:

> "We have long recognized that attorney's fees may be awarded to a successful party when his opponent has acted in bad faith, vexatiously, wantonly, or for oppressive reasons . . . ."

In *Newman v. Piggie Park Enterprises, Inc.*, supra, at 402, in respect to awarding attorney's fees under Title II, this court stated in Footnote 4:

> "4. If Congress' objective had been to authorize the assessment of attorney's fees against defendants who made completely groundless contentions for purposes of delay, no new statutory provision would have been necessary, for it has long been held that a federal court may award counsel fees to a successful plaintiff where a defense has been maintained 'in bad faith, vexatiously, wantonly, or for oppressive reasons."

In *Alyeska Pipeline Service Co. v. The Wilderness Society*, supra, at 283 this court in referring to footnote 4 in *Newman* said:

> "The Court reasoned that if Congress had intended to authorize fees only on the basis of bad faith, no new legislation would have been required in view of the long history of the bad faith exception."

There can be no doubt that a court's authority to award attorney's fees in "bad faith" cases exists independent of statute. By adopting that standard for prevailing defendants under Section 706(k), the Fourth Circuit in effect construed prevailing defendant out of the statute.

(2) Some Other Standard

If the standard for awarding attorney's fees to prevailing defendants is not the same as for plaintiffs, what is it to be? This kind of legislative invitation was declined by the court in *Alyeska Pipeline Services v. The Wilderness Society, et al., supra*, at 263-4, where the court observed:

> "Congress itself presumably has the power and judgment to pick and choose among its statutes and to allow attorney's fees under some, but not others. But it would be difficult indeed for the courts without legislative guidance to consider some statutes important and others unimportant and to allow attorney's fees only in connection with the former. . . . Moreover, should courts, if they were to embark on the course urged by respondents, (1) opt for awards to the prevailing party, whether plaintiff or defendant, or only to the prevailing plaintiff? (2) Should

awards be discretionary or mandatory? (3) Would there be a presumption operating for or against them in the ordinary case?" (Numbers added).

In Section 706(k), Congress answered questions one and two above—awards are to be made to the prevailing party and are to be discretionary. And this Court in *Newman v. Piggie Park Enterprises, Inc., supra.*, answered the third question—there should be a presumption for awarding fees in the ordinary case.

3. A Double Standard?

The plain meaning of the statute should not be tortured to achieve, of all things, a discriminatory result. To impose a different standard for prevailing defendants not only would emasculate the plain language of the statute and the intent of Congress, but as pointed out in the dissent below would create a double standard in the application of Title VII. As the dissent observed:

"Employers are forbidden by the Civil Rights Act to apply double standards to their employees, and I do not accept the proposition that the courts should administer one standard for the plaintiff and a very different standard for the defendant in the prosecution and defense of suits under the statute." (Petition for Cert. 10-A)

* * *

"The net result we end up with as a result of the majority opinion, under a statute which says the court may allow an attorney's fee in its discretion to the prevailing party, is that a prevailing plaintiff is allowed an attorney's fee absent exceptional circumstances, while a prevailing defendant under the same statute is not allowed an attorney's fee unless the plaintiff has prosecuted his

action in bad faith. *I suggest this is not the level floor the courthouse demands.*" (Petition for Cert. 13-A) (Emphasis added)

4. The Same Standard.

The simple language of the statute, the legislative history, this Court's interpretation of Section 202(b) of Title II, the interpretation of Section 706(k) of Title VII by lower courts, and consideration of alternatives, all lead to the inescapable conclusion that the discretionary standard under Section 202(b) and 706(k) is the same and is the same whether the prevailing party be plaintiff or defendant. Only a single standard provides "the level floor the courthouse demands."

CONCLUSION

The Petitioner requests that the case be remanded to the Fourt Circuit with instructions to vacate its judgment and to award attorney's fees to the Petitioner, not only in respect to the original action in the District Court, but also in respect to this action in the District Court, Court of Appeals and Supreme Court.

Respectfully submitted,

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